

FIRST DIVISION  
OCTOBER 7, 2013

MODIFIED UPON DENIAL OF REHEARING NOVEMBER 25, 2013

No. 1-11-2822

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 C6 60164
	)	
DONALD YOUNG,	)	Honorable
	)	Brian Flaherty,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE CUNNINGHAM delivered the judgment of the court.  
Presiding Justice Connors and Justice Hoffman concurred in the judgment.

**ORDER**

¶ 1 *Held:* The prosecutors' statements in closing argument that the defendant's driver's license had been revoked for over 40 years did not constitute improper substantive introduction of the defendant's prior convictions in violation of a motion *in limine*; defense counsel was not ineffective for failing to object to cross-examination that elicited testimony from the defendant that he had not had a valid driver's license in over 40 years.

¶ 2 Following a jury trial, defendant Donald Young was convicted of driving while his license was revoked and sentenced to two years in prison. On appeal, the defendant contends that the prosecutor improperly stated in closing arguments that his license had been revoked for 40 years, in violation of a pretrial ruling barring the State from introducing his prior convictions. In the alternative, the defendant contends that defense counsel was ineffective for failing to object to the State's cross-examination of him, during which it elicited testimony that he had not "had a valid license in over forty years." For the following reasons, we affirm the judgment of the circuit court

of Cook County.

¶ 3 The defendant's conviction arose from the events of November 28, 2008. The State's theory of the case was that in the early morning hours of the day in question, the defendant, knowing that his license was revoked, drove his wife and his nephew home from a bar even though it was not necessary for him to do so. The defense theory was that the defendant's wife, Julie Young (Young), was driving the group home from Thanksgiving dinner at a relative's home. When Young began experiencing symptoms of a schizophrenic episode, the defendant reasonably decided it was necessary for him to drive the car so he could get his wife home to take her medicine.

¶ 4 Prior to trial, the defendant filed a motion *in limine*, seeking to bar the State from introducing evidence of his 10 prior convictions for driving while his license was revoked. The trial court granted the motion, but ruled that if the defendant took the stand, the State could impeach him with his 2004 felony conviction.

¶ 5 At trial, Cook County Sheriff's Department Investigator Gena (Investigator Gena) testified that at about 12:45 a.m. on the day in question, he was on patrol in Midlothian, Illinois. Investigator Gena saw a pickup truck with an extended cab swerve from the left lane of traffic into the right lane without signaling. Investigator Gena pulled the truck over and approached the driver, identified in court as the defendant. The defendant's wife and adult nephew were also in the truck.

¶ 6 The defendant was unable to provide Investigator Gena with a driver's license or proof of insurance, but did have an Illinois identification card. Investigator Gena performed an in-car computer search, and learned that the defendant's driver's licence was revoked. Thereafter, Investigator Gena placed the defendant into custody.

¶ 7 The defendant testified that on the day in question, he, his wife, and his nephew were driving home from his sister's house in Markham, Illinois, where they had been celebrating Thanksgiving. The defendant stated that Young was driving. The defendant explained that he was not driving because his license was revoked, and that his nephew was not driving because "he got a D.U.I. in

Tennessee."

¶ 8 According to the defendant, the group was about half way home when suddenly, Young slammed on the breaks and "cut" the steering wheel. The defendant thought they were going to hit the trees lining the road. The defendant told Young to pull over. Young refused, but then made a sudden stop and told the defendant and his nephew to get out of the truck. The defendant tried to calm Young down, but she kept "flaring up." The defendant testified that Young used words that he did not understand. Although the defendant had known Young for 28 years, he had never seen her act like this before.

¶ 9 The defendant testified that he decided to drive so that he could get Young home to take some medicine. He stated that he wanted to get his wife and nephew home safely, and thought he was doing the right thing. He did not call 9-1-1 because no one in the truck had a cell phone. A few blocks from his home, the defendant was pulled over by a police officer. When the officer came up to the window and asked for the defendant's license and proof of insurance, Young was "just sitting there looking straight ahead." The defendant told the officer that he did not have a license. He attempted to tell the officer about what was happening with Young, but was unsuccessful because the officer was not paying attention to what he was saying. At some point, possibly when he was in the squad car or when he was in the lock-up, he told the police why he was driving.

¶ 10 On cross-examination, the following exchange occurred:

"Q. During that time, you decide to drive the car, correct?

A. Yes, sir.

Q. And you haven't had a valid license in over forty years, is that correct?

A. Something like that.

Q. So, you have known for a long time that you can't drive in the State of Illinois?

A. Yes, I received a letter from Springfield that said that I can reapply for my license.

Q. Okay, but on that date you were revoked?

A. I was revoked."

¶ 11 The defendant also called as a witness Dr. Jorge Fernald (Dr. Fernald), who was Young's treating psychiatrist at the time in question. According to Dr. Fernald, Young had been diagnosed with "schizophrenia disorganized type." He explained that such a diagnosis included very disorganized speech, and stated that when affected persons speak, they often make no sense and utter words that do not exist. Dr. Fernald further explained that such persons' "thinking is completely disjointed and disorganized, and their behavior can be as well." Dr. Fernald stated that a person with disorganized schizophrenia could have episodes of lucidity, and episodes where behavior is "better or worse."

¶ 12 Dr. Fernald testified that he prescribed Young two anti-psychotic medications. However, when Dr. Fernald saw her on November 12, 2008, Young reported that she was not taking her medication. Dr. Fernald stated that Young's pharmacy records indicated that she had not filled her prescriptions since June. Dr. Fernald opined that Young could drive if she were compliant with her medications, but recommended that she should not be allowed to drive when noncompliant.

¶ 13 The State then called Investigator Gena on rebuttal. Investigator Gena testified that the defendant never told him he was concerned for his wife's health or safety, or that he was trying to get her home to take her medication.

¶ 14 The State also called Cook County Sheriff's Officer Scofield (Officer Scofield) as a rebuttal witness. Officer Scofield testified that on the night in question, he was requested to assist Investigator Gena with a traffic stop. When Officer Scofield arrived at the scene, Investigator Gena placed the defendant in custody. Officer Scofield drove the defendant's wife and nephew to the Markham courthouse, at their request. When asked how Young acted during the ride, Officer

Scofield stated that there was nothing unusual or out of the ordinary about her actions or speech.

¶ 15 Prior to closing arguments, the State entered into evidence a certified statement of conviction reflecting that in 2004, the defendant had been convicted of driving while his license was revoked.

¶ 16 The prosecutor began her closing argument with the following statement: "Good afternoon everyone. Do not feel sorry for this the defendant. He made his choice to drive on November 28, 2008, knowing full well for over forty years that his driver's license was revoked." The prosecutor then went on to state that the defendant had a motive to fabricate his testimony, and questioned the believability of his version of events. Defense counsel argued that the defendant drove out of necessity, as he reasonably believed he needed to get his wife and nephew home safely so that his wife could take her medication. In rebuttal, the prosecutor again referenced the revocation of the defendant's license, stating, "[D]efendant lost his privilege to drive many years ago. His license has been revoked for over forty years. He knows he isn't supposed to be driving, and he made that choice."

¶ 17 After the jury was instructed and began deliberations, the defendant moved for a mistrial arguing that the State had violated the motion *in limine* by stating that his driver's license had been revoked for over 40 years. The trial court denied the motion, finding that the evidence had come out on cross-examination.

¶ 18 The jury found the defendant guilty of driving while his license was revoked, and the trial court entered judgment on the verdict. Subsequently, the defendant filed a motion for new trial. The defendant argued, in pertinent part, that the State violated the motion *in limine* by stating in closing argument that the defendant was not legally able to drive for 40 years. The trial court denied the motion. Thereafter, the trial court sentenced the defendant to two years in prison.

¶ 19 On appeal, the defendant contends that in violation of the pretrial ruling barring the State from substantively introducing his prior convictions, the prosecutors improperly stated in closing arguments that his driver's license had been revoked for 40 years. The defendant argues that the

prosecutors' statements insinuated that he had a 40-year history of prior convictions. He claims that the only reasonable interpretation that the jury could have had upon hearing the comments was that he had additional convictions during a 40-year time span that resulted in the revocation of his license. The defendant further argues that this evidence did not come out on cross-examination, as his testimony at that time was simply that he had not had a license for over 40 years, not that the license had been revoked for that time period. According to the defendant's argument, because the outcome of the case hinged entirely on the jury's credibility determination, the State's substantive use of inadmissible evidence was likely to have impacted the verdict.

¶ 20 As an initial matter, we address the State's assertion that the defendant has forfeited this issue by failing to make a timely objection at trial. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (both a trial objection and a written posttrial motion raising the issue are required to preserve error for review). The defendant asserts that his motion for mistrial served the same function as an objection, thus, the issue is not forfeited. We disagree. An objection made in a motion for mistrial after closing arguments constitutes a failure to make a timely objection. *People v. Roberts*, 83 Ill. App. 3d 311, 317 (1980). Accordingly, the issue is forfeited.

¶ 21 The defendant argues in his reply brief that the issue is reviewable as plain error because the evidence was closely balanced, the case involved a credibility contest between the defendant and Investigator Gena, and the improper use of prior crimes evidence likely impacted the verdict. In general, this court may consider forfeited errors if (1) the evidence is so closely balanced that the error threatens to tip the scales of justice against the defendant; or (2) the error is so serious that it affects the fairness of the defendant's trial. *People v. Sargent*, 239 Ill. 2d 166, 189 (2010). However, before applying the plain error rule, we must first determine whether any error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 22 Prosecutors are afforded wide latitude in closing arguments and may comment on the evidence and any reasonable inferences therefrom. *People v. Perry*, 224 Ill. 2d 312, 347 (2007). On

review, we consider challenged remarks in the context of the entire record as a whole, in particular the closing arguments of both sides. *People v. Williams*, 313 Ill. App. 3d 849, 863 (2000). While prosecutors may not argue facts not in evidence, such remarks do not warrant reversal unless they are so prejudicial as to constitute a material factor in the defendant's conviction. *People v. Lane*, 256 Ill. App. 3d 38, 56 (1993).

¶ 23 On cross-examination in the instant case, the defendant acknowledged that he had not "had a valid license in over forty years," and that on the date in question, his license was revoked. In closing arguments, the prosecutors stated that the defendant's driver's license had been revoked for over 40 years. In our view, this was a fair paraphrase of the defendant's testimony. The comments reflected what was elicited from the defendant at trial: that he had not had a license in over 40 years; he had known for a long time that he was not allowed to drive in Illinois; and on the day he was pulled over by Investigator Gena, he was driving on a revoked license. Accordingly, we find that the prosecutors' statements were reasonable comments on the evidence and there was no prosecutorial misconduct or error. There being no error, plain error review does not apply. See *Thompson*, 238 Ill. 2d at 613. We note that even if the prosecutors' statements were in error, the statements did not rise to the level of plain error because they did not impact the outcome of the trial. Additionally, the evidence in this case was not closely balanced. Notwithstanding the prosecutors' statements, *the defendant testified that he drove the pickup truck*, on the day in question, while his license was revoked. Also, the evidence showed that the defendant never told Investigator Gena that he was concerned about Young's health or safety. Further, Officer Scofield testified that Young's behavior was normal when he drove her to the Markham courthouse. Thus, the defendant still would have been convicted without the prosecutors' statements.

¶ 24 Anticipating our finding, the defendant contends that defense counsel was ineffective for failing to object to the portion of the State's cross-examination during which it elicited testimony that he had not "had a valid license in over forty years." The defendant argues that because defense

counsel knew he would be prejudiced by the substantive use of his prior convictions, her failure to object was unreasonable. He further argues that he was prejudiced by the failure to object, as the introduction of the fact his license had been revoked for 40 years was irrelevant and allowed the jury to convict based on a presumption that he had a propensity to commit traffic offenses. The defendant asserts that had counsel objected to the admission of this evidence, the jury may have decided differently.

¶ 25 The standard for a claim of ineffective assistance of counsel has two prongs: (1) deficient performance; and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). First, a the defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. In order to establish this prong, the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy. *People v. Smith*, 195 Ill. 2d 179, 188 (2000). Second, a defendant must establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reviewing court need not address both prongs of the inquiry if the defendant makes an insufficient showing as to one prong. *Strickland*, 466 U.S. at 697.

¶ 26 Here, a review of the defendant's direct examination demonstrates that the State's cross-examination of him was proper. When a defendant chooses to testify on his own behalf, the State is entitled and obligated to use all of the impeaching evidence it possesses in order to impact the defendant's credibility. *People v. Jackson*, 391 Ill. App. 3d 11, 33 (2009). On cross-examination, an attorney may inquire into "whatever tends to explain, qualify, modify, discredit, or destroy the testimony on direct." (Internal quotation marks omitted.) *People v. Gordon*, 247 Ill. App. 3d 891, 906 (1993).

¶ 27 On direct examination, the defendant testified that on the date in question, his license was revoked and he knew he was not supposed to drive. Given this testimony, the State was entitled to



probe into the circumstances of the defendant's knowledge of the status of his driver's license. We find no impropriety in the State's cross-examination of the defendant. An objection would have been overruled, and defense counsel cannot be considered ineffective for failing to make a futile objection to the questioning at trial. *People v. Groel*, 2012 IL App (3d) 090595, ¶ 51. Therefore, we hold that defense counsel was not ineffective for failing to object to the State's comments during closing argument.

¶ 28 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.